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24729 BERRY v. STATE. Delaware County. *Affirmed.* Willoughby, J. February 12, 1929.

Appellant is convicted on the charge of conspiring to commit a felony of unlawfully possessing and controlling a still and distilling apparatus for the manufacture of intoxicating liquor. See opinion for full discussion of the objections: (1) That the facts stated in said affidavit do not constitute a public offense, and (2) That the affidavit does not state the offense charged therein with sufficient certainty. It was not error to admit as evidence statements made by a defendant co-conspirator when such statements were offered after the establishing of a prima facie case of conspiracy, although such statements were not made in the presence of the defendant.

24772 DAMRON v. STATE. Warrick County. *Affirmed.* Willoughby, J. February 14, 1929.

Defendant was convicted on a charge of conspiring to commit a felony; the specifications of error are the refusing and giving of certain instructions, and that the verdict of the jury is contrary to law. There was no error in the matter of instructions and the verdict of the jury was sustained by sufficient evidence and not contrary to law.

24534 DAVIS v. STATE. Jay County. *Reversed.* Willoughby, J. February 13, 1929.

This was an appeal from a conviction on an affidavit charging larceny. On authority of *Landess v. State*, 164 N. E. 264, the judgment of the trial court is reversed.

25349 MOSLEY v. THE BOARD OF COMMISSIONERS OF THE COUNTY OF MARION, ET AL. Marion County. *Affirmed.* Gemmill, J. February 19, 1929.

This is an action testing the constitutionality of Ch. 194, Acts 1925, pp. 457-463, authorizing municipal courts in incorporated cities containing a population of not less than 300,000, according to the last preceding census of the United States. The Act in question is not invalid by reason of the provision which authorizes the judges of the municipal court to be appointed by the governor nor is it open to objection upon the ground that it is local and special. There was no error in sustaining the demurrers to the amended complaint.

25350 MOSELY ET AL, AS JUSTICE OF THE PEACE OF CENTER TOWNSHIP, MARION COUNTY, INDIANA v. THE BOARD OF COMMISSIONERS OF THE COUNTY OF MARION, ET AL. Marion County. *Affirmed.* Gemmill, J. February 19, 1929.

This action involves the validity of an act of the 1925 General Assembly (Ch. 117, p. 293, Acts of 1925), reducing the number of justices of the peace to one in townships of the state located in whole or in part within the corporate limits of any city wherein municipal courts exist; such municipal courts being provided for by Ch. 194, Acts 1925, pp. 457-463, for cities containing a population of not less than 300,000. While Article 7,

sec. 14 of the State Constitution provides that "a competent number of justices of the peace shall be elected by the voters in each township in the several counties," it leaves the number to legislative determination; and any regulation formerly made by the Board of Commissioners that provided for more than one justice of the peace in the township in question was in conflict with Chapter 117, Acts 1925 and could not govern after the term of appellant had expired.

24826 ROTHCHILD v. STATE. Marion County. *Reversed.* Myers, J. February 13, 1929.

Appellant was indicted and convicted in the court below of perjury. The defendant in an *affidavit before a notary public* had stated that he was the owner of the property consisting of stocks and fixtures and that there were "no liens or equitable mortgages, liens, rights or claims of any kind outstanding against any of said property. This affidavit is made for the purpose of inducing ———— ———— to purchase said goods." At the time of the making of the affidavit there was an outstanding judgment against the defendant. The court says that prior to the consumation of a bulk sale, as here, the judgment creditor, in the absence of an execution in the hands of an officer or other non-lien holding creditor, has no lien, right or claim by virtue of our Bulk Sales Law against the personal property of the seller; and consequently the affidavit made by the defendant did not constitute the offense of perjury within sec. 2577 Burns 1926.

25335 STATE EX REL. BAKER v. ORANGE, ET AL. Vanderburg County. *Reversed.* Martin, C. J. February 15, 1929.

This case involves the interpretation of the term "municipal courts" as used in Sec. 1, Ch. 117, Acts 1925, sec. 1858 Burns 1926, in relation to the question of the law of justices of the peace in certain counties. The court says that considering the foregoing section along with two other laws which were enacted at the same session of the General Assembly, and which concerned courts which are denominated "municipal courts," the reasonable conclusion is that the term "municipal court" in Sec. 1858 Burns 1926 means the same that it does in the other two laws, viz.: "the name of a certain county court of inferior jurisdiction in counties which contain a city of not less than 300,000 inhabitants."

24507 WISCHMEYER v. STATE. Marion County. *Reversed.* Travis, J. February 19, 1929.

Appellant was charged in different counts of various violations of the law concerning intoxicating liquor. There was a motion to quash the affidavit for the reason that it was not approved by the prosecuting attorney as required by law; also exceptions to the order to confiscate and sell the automobile. Because of such omission of the prosecuting attorney's approval the affidavit was insufficient to lawfully present the crime, and the overruling of the motion to quash was error since there was not a lawful "conviction". The order of the court confiscating and selling the automobile was invalid. The court distinguishes from *Parish v. State* (1923) 1924 Ind. 44; 141 N. E. 786, as respects the requirement of endorsement by the prosecuting attorney, pointing out that in that case the crime was a misdemeanor of which the city court had jurisdiction to try and fully determine.

APPELLATE COURT

13166 (cases 13166 to 13173 inclusive, consolidated under this number.) ABDEN V. WALLACE, ET AL. Marion County. *Reversed.* Nichols, J. February 18, 1929.

Action by appellant against appellees to obtain injunctive relief compelling appellees and those whom they represent to recognize appellant as a member of the Grand International Brotherhood of Locomotive Engineers, and one of its subordinate local divisions, and prohibiting appellees and those whom they represent from interfering with appellants' rights, etc. "The judgment is reversed with instructions to the court to restate its conclusions of law in harmony with this opinion and to render judgment accordingly." See opinion for full discussion of the findings and conclusions of law based thereon.

13167 ABDEN V. WALLACE, ET AL. Marion County. *Reversed.* Nichols, J. February 15, 1929.

Reversed on authority of *Abden v. Wallace, et al.* (decided this term).

13169 ALLEY V. WALLACE, ET AL. Marion County. *Reversed.* Nichols, J. February 15, 1929.

Reversed on authority of *Abden v. Wallace, et al.* (decided this term).

13370 ATLAS SECURITIES CO. V. FERRELL. Boone County. *Affirmed.* Nichols, J. February 1, 1929.

Action by appellees for the cancellation of a certain note and mortgage securing the same on the ground that the note and mortgage were executed for an illegal and invalid consideration and under duress. The appellant complains that the special finding contains evidentiary facts and that there are conclusions of law in such findings. The court says that eliminating in the findings the evidential facts of which appellant complains, and the conclusions which it contends are of law and not of facts, the findings are still sufficient upon which to base conclusions of laws.

13130 THE BALTIMORE & OHIO SOUTHERN RD. CO. V. BEACH. Jennings County. *Reversed.* Nichols, C. J., McMahan, P. J. and Remy, J. dissent. February 23, 1929.

Appellee seeks to recover from the appellant, his employer, under the provisions of the Federal Employers Liability Act, for an injury alleged to have been due to the negligent operation of a motor car by a fellow-employee, the negligence consisting of operating the car at a dangerous and excessive rate of speed. The opinion states that "by continuing in the employee of the appellant, and riding on the motor car during the several years that he was in such employment, when he knew that it was being operated at an excessive and dangerous speed, and in violation of the rules of appellant, assumed the risk of such dangerous operation."

13159 BLASENGYM V. GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORP, LTD. Marion County. *Reversed.* Enloe, C. J. February 20, 1929.

This is an action to recover for damages to an automobile received in a collision at the intersection of two streets. By the act creating the municipal courts (Acts 1925, sec. 25, sec. 1748 Burns 1926) a judge *pro tempore*

before whom the case was tried, has authority to file the bill of exceptions after the term for which he had been appointed has expired. Sec. 1054 Burns 1926 should not be given the construction that the right of the one reaching the intersection of the streets or highways first is an absolute right. Both drivers should exercise reasonable care to avoid coming into a collision and "even though the street or highway upon which he is traveling be a 'preferential' one, it is still his duty to use reasonable care to avoid coming into collision with another machine, though the *quantum* of care may vary with the surrounding circumstances."

13353 CITY OF BLOOMINGTON v. LUZADDER. Monroe County. *Affirmed.* Per Curiam. February 19, 1929.

Per Curiam Affirmed with 10% penalty.

13235 BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY, INDIANA v. DAVIS. Tippecanoe County. *Affirmed.* Nichols, J. February 23, 1929.

The chief question in this case is whether appellee is entitled, as assessor of Fairfield township, Tippecanoe County, to a salary of $3000 per annum under Sec. 14176 Burns 1926. The court says that appellee's claim is a valid one and that he pursued the proper remedy by filing his claim with the Board of County Commissioners and after failing to secure its allowance, by appealing to the circuit court. Appellee's claim is not rendered invalid by reason of the fact that no appropriation of money with which to pay the same has been made, since his claim does not grow out of a contract made in violation of the law.

13279 BURTON, ET AL. v. RYAN, ET AL. Orange County. *Affirmed.* McMahan, P. J. February 13, 1929.

This is an action to obtain possession of certain personal property. There was no error in refusing a change of judge under the facts in the case, nor in refusing to try the case before the jury. The evidence was sufficient to support the findings as to ownership of the property.

13279 BURTON, ET AL. v. ORANGE COUNTY. *Affirmed.* McMahan, P. J. February 13, 1929.

From a decree declaring a deed a mortgage, the defendants appeal. The trial court did not err in finding that the deed and contract executed concurrently constituted a mortgage, and not a conveyance subject to a conditional right on the part of the grantor to buy the land back.

13374 CANAN v. CANAN. Floyd County. *Reversed.* McMahan, P. J. February 20, 1929.

This was an action for divorce and it is contended that the decision of the lower court was contrary to law inasmuch as the court was without jurisdiction, for the reason that the affidavit of the residence of appellee filed with his complaint as required by sec. 1097 Burns 1926 did not confer jurisdiction on the court. The statute was not substantially complied with.

13180 CAPITOL AMUSEMENT CO., ET AL. v. WASHINGTON & NEW JERSEY REALTY CO. Marion County. *Affirmed.* Remy, J. February 1, 1929.

Suit in a municipal court by appellee as landlord against his tenant and a co-defendant who had guaranteed that the tenant would carry out the

terms of his lease, judgment being rendered against each of them for possession of real estate and damages in the sum of $1000. The court concludes that the municipal court has unlimited jurisdiction as to damages recoverable in an action for possession and the recovery of damages; but as against the defendant guarantor, the statute which limits jurisdiction in actions founded on contract applies and his demurrer should have been sustained.

13217 DETROIT FIDELITY & SURETY CO. V. RICKEY, ET AL. Marion County. *Affirmed.* Remy, J. February 23, 1929.

This was an action on a surety bond for the value of materials and labor furnished to the contractor-principal. The bond in question was given by the contractor to induce the obligee to pay the balance to become due upon the completion of a certain building, in accordance with the terms of an existing contract. The conditions of the bond obligation were that the principal should faithfully perform the contract on his part, and satisfy all claims, etc. There was sufficient consideration for the bond in that the contractor received payment without having to comply with certain provisions under the original building contract. The surety company was not released by reason of alterations in the original contract as the alterations were made in accordance with the terms of the contract. The court says that any doubt about the bond's covering the modified contract is taken care of by the rule that bond executed by a surety for property will be construed most favorably to the person secured, if the bond is open to two constructions.

13352 FLEMING V. BISHOP. Elkhart County. *Reversed.* Lockyear, J., Enloe, P. J. dissents. February 15, 1929.

This action was upon a broker's contract for commissions for selling real estate and the chief question was whether the memorandum contained sufficient descriptions of the real estate to comply with Sec. 8048 Burns 1926. The court concludes that the reference to the real estate is sufficient to identify the same and says: "We believe that any man of ordinary intelligence, given the above description, could go out and find the farm."

13198 GEIGER V. UHL, ET AL. Marion County. *Reversed.* Remy, J. February 13, 1929.

This case involves chiefly the adjusting of boundaries of lots in a platted addition, when the actual measurement of the platted addition, compared with the boundaries shown by the plat, reveals a deficiency of frontage. The court rejects the "remnant rule" and adopts the "apportionment rule" which requires that the deficiency or surplus be apportioned among the owners of all lots in the block or subdivision containing the deficiency or surplus.

13544 HERBERT V. NATIONAL CITY BANK, EXECUTOR, ET AL. Vanderburgh County. *Reversed.* Remy, J. February 20, 1929.

This is an action by a widow to contest the will of her husband. One question presented is: Can appellant, who as widow had made her election under the law, maintain an action to contest the will? The court says that the appellant has a subsisting property interest in the estate affected by

the will and therefore sufficient interest to maintain this action; and that by her action in electing to take against the will, she did not recognize the instrument in question as a valid will, and would not thereby estop herself to contest the validity of the instrument.

13396 HIXON v. NIMAN. Marion County. *Affirmed.* Lockyear, J. February 20, 1929.

This is an action by the father of a minor son to recover for personal injuries received by the minor, consolidated with an action by the father against the same defendant for loss of services, etc. The error filed was the overruling of a demurrer to the second paragraph of the answer and the court says the second paragraph of the answer is only an argumentative denial of the material facts of the complaint and therefore it was not error to overrule the demurrer to it.

13397 HIXON v. NIMAN. Marion County. *Affirmed.* Lockyear, J. February 20, 1929.

Affirmed on authority of *Hixon v. Niman*, being No. 13396 decided this term.

13316 ESTATE OF MARY EMALINE HOLEM v. HAMPTON. Marshall County. *Affirmed.* Per Curiam. February 19, 1929.

Per Curiam. Affirmed with 10% penalty.

13029 INDIANAPOLIS MOTOR SPEEDWAY CO. v. SHOUP. Hancock County. *Reversed.* Nichols, J., McMahan, P. J. dissents. February 18, 1929.

Action to recover for death of minor son who was struck by a racing car while viewing race from outside the inclosure surrounding race track of appellant. Opinion distinguishes the facts from "attractive nuisance cases" and says that "the charge against appellant is want of the exercise of due care, or negligence, and appellee's son, being at most, a mere licensee, appellant owed him no legal duty in this regard.

13274 IROQUOIS AUTO INSURANCE UNDERWRITERS, ET AL. v. STOCKER. Vanderburg County. *Affirmed.* McMahan, P. J. February 14, 1929.

The case involves the power of an agent to bind the appellant-insurance company for repairs to automobiles, the appellant claiming that a part of appellee's claim was for work done on automobiles which were not within the coverage of its policies and that the alleged agent had no authority to have the automobiles repaired on the credit of the appellants. The trial court was justified in finding that the agent was acting within the apparent scope of his authority when he sent the automobiles to appellee to be repaired. See case for the facts.

13264 LEWIS, ADMR. v. SHEAKS, ET AL. St. Joseph County. *Reversed.* Neal, J. February 23, 1929.

Reversed on the authority of *Feldman v. Elmore*, 163 N. E. 846.

13139 LORBER v. PEOPLES MOTOR COACH CO., ET AL. Marion County. *Reversed.* Neal, J., Nichols, J. concurs in result. February 1, 1929.

This was an action to recover from two defendants, on the theory of concurrent negligence, for injuries received in an automobile collision. The trial court instructed the jury to return a verdict for the defendant bus

company. Since the motion for an instructed verdict is equivalent to a demurrer to the evidence, "the court is bound to accept as true all the facts which the evidence tends to prove, and, as against the party demurring, to draw from the evidence such reasonable inference as the jury might draw and also to resolve all conflicts in the evidence favorable to the parties against whom the demurrer is directed." Consequently it was error to sustain the motion for directed verdict since there was evidence from which it might have been inferred that the bus was not operated in a careful manner.

13170 MARTIN v. WALLACE, ET AL. Marion County. *Reversed.* Nichols, J. February 15, 1929.

Reversed on authority of *Abden v. Wallace, et al.* (decided this term).

13561 MATHENA v. LOSEY. Johnson County. *Reversed.* McMahan, P. J. February 21, 1929.

This case involves a claim for salary as deputy sheriff under the appointment claimed to have been made by the sheriff pursuant to Sec. 11620 Burns 1926. The trial court found the facts specially and concluded as a matter of law that appellee was entitled to recover a certain sum. The decision of the trial court is not sustained by the evidence and the court erred in excluding certain evidence as to the amount of salary paid by the sheriff to appellee.

13169 MCGINNIS v. WALLACE, ET AL. Marion County. *Reversed.* Nichols, J. February 15, 1929.

Reversed on authority of *Abden v. Wallace, et al.* (decided this term).

13205 MINAS FURNITURE CO. v. EDWARD C. MINAS CO. Porter County. *Affirmed.* Nichols, J. February 23, 1929.

This was an action by appellee to enjoin appellant from the use of the word "Minas" in its corporation name, and from alleged unfair trade competition and for damages for alleged invasion of its rights, appellee claiming a prior right to the use of the name "Minas". See opinion for the facts and full discussion.

13278 CITY OF MUNCIE v. SHARP. Delaware County. *Reversed.* McMahan, P. J. February 15, 1929.

This was a suit by appellee to recover from the appellant city for damages to property which damage was alleged to have been caused by the appellant's "purposely, wilfully and wrongfully" failing to remove certain pipes from which water was being discharged upon appellee's property. "The complaint being based upon the theory that appellee was the legal owner of the property, and the cause having been tried upon that theory, it will be disposed of in this court on the same theory. The undisputed evidence being that appellee was not the owner when this action was commenced, we hold the verdict is not sustained by the evidence."

13284 ROCHFORD, ADMR., v. METROPOLITAN LIFE INS. CO. Marion County. *Reversed.* Nichols, J. February 1, 1929.

Where defendant died outside the state of Indiana, leaving no property except two life insurance policies located in Marion county, Indiana, these

policies constitute assets within the meaning of Sec. 3066 Burns 1926 which provides among other things that letters of administration of an estate may be granted where the defendant, not being an inhabitant, and dying out of the state, leaves assets.

13171 ROTHER v. WALLACE, ET AL. Marion County. *Reversed.* Nichols, J. February 15, 1929.

Reversed on authority of *Abden v. Wallace, et al.* (decided this term).

13172 RYAN v. WALLACE, ET AL. Marion County. *Reversed.* Nichols, J. February 15, 1929.

Reversed on authority of *Abden v. Wallace, et al.* (decided this term).

13365 SHEPHERD v. BANNISTER, ET AL. Marion County. *Affirmed.* Per Curiam. February 15, 1929.

Per Curiam.

13314 STOLL, ET AL. v. RICH, ET AL. St. Joseph County. *Reversed.* Nichols, J. February 23, 1929.

This is an action by attorneys for executors of an estate to recover their fees as attorneys. The claim was filed in the St. Joseph circuit court and the judge thereof on his motion transferred the same, without any objection, to the St. Joseph superior court No. 3. The appellants having appeared and filed their motion to make the complaint more specific, and then having secured a change of judge on which the cause was transferred to superior court No. 2 and the case having gone to trial, the appellants waived their right to object to the superior court's jurisdiction of the particular case, the court having general jurisdiction over such matter under Sec. 1608 Burns 1926. It was error to refuse to permit cross-examination of attorneys as expert witnesses, as to the value of the respective services performed.

13468 STOLL v. BOLIN. Lake County. *Affirmed.* Per Curiam. February 23, 1929.

Per Curiam.

13173 TAYLOR v. WALLACE, ET AL. Marion County. *Reversed.* Nichols, J. February 15, 1929.

Reversed on authority of *Abden v. Wallace, et al.* (decided this term).

13307 UNION DRAWN STEEL CO. v. THOMPSON. Industrial Board. *Affirmed.* Enloe, C. J. February 25, 1929.

As a result of an injury received June 12, 1926, the appellee, under a compensation agreement approved by the Industrial Board, received five and two-sevenths weeks compensation for a "temporary total disability." On December 9, 1927, appellee filed an application for an award on account of a change of condition. Where an injury results in an immediate temporary disability, and also in an immediate permanent partial impairment there will be two independent claims, one for the temporary total disability and one for the partial impairment, and these claims, as to the time of their filing with the Industrial Board, are covered by Sec. 24 of our Compensation Act and not by Sec. 45 which controls as to time for filing applications for awards based upon "change of condition." Therefore the application for

an award of compensation as for permanent partial impairment filed December 9, 1927, was within the time given by Sec. 24.

13203 WEIDNER V. CITY OF RICHMOND. Henry County. *Affirmed.* Nichols, J., Neal, J. concurs in result. February 15, 1929.

This was an action to recover a sum of money which the plaintiff alleged consisted of interest on "Barrett Law" funds, which interest the plaintiff had received while county treasurer and ex-officio treasurer of the defendant city of Richmond and while having said "Barret Law" funds in his custody; the plaintiff alleging that he had paid over the money "under protest, over his objection and against his will." While indicating that Barret Law funds are public funds and therefore subject to the provisions of the depository acts, the court does not determine this question; but says that the act of loaning the fund was an illegal act under Sec. 2467 Burns 1926 and consequently the present action of the appellant is in effect an action based on his own illegal act. Consequently the law will not help him, but will leave him where it finds him.